LIBRARY
SUPREME COURT, U. S
NOV 27
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

No. 73-836

STATE OF LOUISIANA, ex rel.
EDGAR L. BARRABINO,
Respondent,

versus

C. MURRAY HENDERSON, Warden,
Louisiana State Penitentiary,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

WILLIAM J. GUSTE, JR.,
ATTORNEY GENERAL
OF LOUISIANA

BARBARA RUTLEDGE,
ASSISTANT ATTORNEY
GENERAL OF LOUISIANA

JIM GARRISON,
DISTRICT ATTORNEY
FOR ORLEANS PARISH

LOUISE KORNS,
ASSISTANT DISTRICT
ATTORNEY FOR
ORLEANS PARISH

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS FOR REVIEW 2

STATEMENT OF THE CASE 2

ARGUMENT 5

I *Mapp* v. *Ohio* Should Be Overruled 5

II Alternatively, Except In Extraordinary Circumstances, The Exclusionary Rule of *Mapp* Should Not Be Available In Post-Conviction Proceedings When The Issue Was Not Raised Prior To Or During Trial 8

CONCLUSION 14

CERTIFICATE 16

APPENDIX 1a

TABLE OF AUTHORITIES

Cases

Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411-427 (1971) 5

Coolidge v. New Hampshire, 403 U.S. 443 (1971) 5, 6

Fay v. Noia, 372 U.S. 391 (1963) 11, 12, 13

Henry v. State of Mississippi, 198 So.2d 213 (Miss. 1967), cert. denied 392 U.S. 931 (1968) 12

Henry v. State of Mississippi, 379 U.S. (1965) .. 11, 12, 13

Kaufman v. United States, 394 U.S. 217 (1969) .. 11, 13

TABLE OF AUTHORITIES (Continued)

Page

Mapp v. Ohio, 367 U.S. 643 (1961) 2, 5, 8, 9

Schleicher v. State, 483 S.W.2d 393 (1972) 13

State v. Cryer, 262 La. 575 (1972) 10

State v. Davidson, 248 La. 161, 177 So.2d 273 10

State v. Lawrence, 260 La. 169 (1971) 10

State v. Rasheed, 248 La. 309, 178 So.2d 261 10

Townsend v. Sain, 372 U.S. 293 (1963) 11

Miscellaneous:

Art. 703 Louisiana Code of Criminal Procedure . 3, 8, 10

Art. 841 Louisiana Code of Criminal Procedure .. 8, 10

Rule 41(e) Federal Rules of Criminal Procedure. 8, 10

28 U.S.C. 1257 2

La. R.S. 14:64 3

Louisiana Constitution, Article 7, Section 10 9

IN THE
SUPREME COURT OF THE UNITED STATES

No.

STATE OF LOUISIANA, ex rel.
EDGAR L. BARRABINO,
Respondent,

versus

C. MURRAY HENDERSON, Warden,
Louisiana State Penitentiary,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

OPINIONS BELOW

The Reasons For Judgment of the Honorable Rudolph F. Becker, III, Judge of Section E of the Criminal District Court for the Parish of Orleans, State of Louisiana, and the per curiam opinion of the Louisiana Supreme Court appear in the appendix to this brief. In Louisiana, district court opinions are not reported, and as of the writing of this brief the per curiam opinion of the Louisiana Supreme Court has not as yet been reported.

JURISDICTION

The judgment of the Louisiana Supreme Court in the instant case was rendered on October 19, 1973. Under Rule IX, Section 6, of the rules of that court, an application for rehearing will not be considered when the court has merely granted an application for a writ, as occurred herein. The State of Louisiana was given a stay of proceedings in the matter by the Louisiana Supreme Court on October 25, 1973, pending application to this Honorable Court for a Writ of Certiorari.

The jurisdiction of this Court derives from 28 U.S.C. 1257.

QUESTIONS FOR REVIEW

I

Whether *Mapp v. Ohio*, 367 U.S. 643 (1961), should be overruled.

II

Alternatively, whether the exclusionary rule of *Mapp* shall be available in post-conviction proceedings in cases in which the issue was not raised prior to, or at least during, the trial resulting in the conviction.

STATEMENT OF THE CASE

On April 28, 1969, a bill of information was filed by the District Attorney for the Parish of Orleans charg-

ing Edgar L. Barrabino, respondent herein, with the armed robbery of one Frank Steward. See La. R.S. 14:64. The accused retained an experienced local criminal attorney, Lyall Shiell, Esq., and pleaded not guilty. Represented by Mr. Shiell, Barrabino was tried on May 26, 1969, but a mistrial was declared because the jury could not agree on a verdict. On June 17, 1969, he was tried again (still represented by Mr. Shiell), and this time he was found guilty, and was sentenced to serve eighteen years at hard labor in the Louisiana State Penitentiary. He filed no Motion For New Trial, nor did he appeal to the Louisiana Supreme Court from this conviction and sentence.

At no time, either prior to or during these two trials, did defense counsel file a Motion To Suppress Evidence, see Art. 703 La. Code Crim. Proc.; nor did counsel during either of these trials object, either directly or indirectly, to the introduction into evidence of the pistols and money.

Four years later, on June 26, 1973, Barrabino in propria persona filed a Petition For Writ of Habeas Corpus in the trial court (Section E of the Criminal District Court for the Parish of Orleans) in which petition he alleges that his trial counsel was ineffective because counsel did not move to suppress certain evidence introduced at his trial (the pistols and the fruits of the armed robbery) which allegedly had been seized in violation of the Fourth Amendment to the United States Constitution. However, no facts are alleged in the Petition For Writ of Habeas Corpus to cast doubt on the constitutionality of the search and seizure, which ap-

pear to have occurred while Barrabino was fleeing the scene of the robbery with a sack of money and pistols.

The trial judge denied the Petition For Writ of Habeas Corpus without a hearing, being of the view that the Fourth Amendment issue had been waived by not being timely raised.

Barrabino then filed a Petition For Writ of Habeas Corpus in the Supreme Court of Louisiana, in which the identical contention was made. On October 19, 1973, the Louisiana Supreme Court, in a four to three decision, granted the writ and ordered the trial judge to hold an evidentiary hearing "on the allegations of conviction on the basis of evidence obtained by unlawful search and seizure, and upon whether the relator counsel had made a deliberate bypass of state procedure to urge such contentions, thus waiving any present right to complain." Various decisions of this Court were cited in the per curiam opinion of the Louisiana Supreme Court in support of the ruling. As the concurring opinion of Justice Tate shows, even the majority doubted the wisdom of their decision, but felt themselves bound by the decisions of this Court.*

The State of Louisiana, through the District Attorney for the Parish of Orleans, obtained a stay order so that it could apply to this Honorable Court for a Writ of Certiorari to review the matter.

---

*The Louisiana Supreme Court's judgment herein was rendered in an *ex parte* proceeding, as there was no oral argument, and the State of Louisiana was not even given an opportunity to file a brief in opposition to the Petition For Writ of Habeas Corpus.

ARGUMENT

I

Mapp v. Ohio Should Be Overruled

The State of Louisiana respectfully asks this Honorable Court to overrule *Mapp v. Ohio*, 367 U.S. 643 (1961), which extended the exclusionary rule to the States through the Fourteenth Amendment.

In an eloquent dissent a couple of years ago Chief Justice Burger questioned the efficacy of the exclusionary rule. See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 411-427 (1971). Citing Cardozo's famous remark that "The criminal is to go free because the constable has blundered," the Chief Justice of the United States goes on to say:

> "Instead of continuing to enforce the suppression doctrine inflexibly, rigidly, and mechanically, we should view it as one of the experimental steps in the great tradition of the common law and acknowledge its shortcomings. But in the same spirit we should be prepared to discontinue what the experience of over half a century has shown neither deters errant officers nor affords a remedy to the totally innocent victims of official misconduct." 403 U.S. at 420.

On the same day *Bivens* was decided, this Court also handed down its opinion in *Coolidge v. New Hampshire*,

403 U.S. 443 (1971). The vote was five-to-four. Chief Justice Burger and Justices Black, Blackmun and White dissented. Particularly noteworthy, however, are not the four dissenters' opinion, but the concurring opinion of the late Justice Harlan. Justice Harlan wrote:

> "From the several opinions that have been filed in this case it is apparent that the law of search and seizure is due for an overhauling. State and federal law enforcement officers and prosecutorial authorities must find quite intolerable the present state of uncertainty, which extends even to such an everyday question as the circumstances under which police may enter a man's property to arrest him and seize a vehicle believed to have been used during the commission of a crime.
>
> "I would begin this process of re-evaluation by overruling *Mapp v. Ohio*, 367 U.S. 643 (1961), and *Ker v. California*, 374 U.S. 23 (1963). The former of these cases made the federal 'exclusionary rule' applicable to the States. The latter forced the States to follow all the ins and outs of this Court's Fourth Amendment decisions, handed down in federal cases.
>
> "In combination *Mapp* and *Ker* have been primarily responsible for bringing about serious distortions and incongruities in this field

of constitutional law. Basically these have had two aspects, as I believe an examination of our more recent opinions and certiorari docket will show. First, the states have been put in a federal mold with respect to this aspect of criminal law enforcement, thus depriving the country of the opportunity to observe the effects of different procedures in similar settings. See *e.g.*, Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U.Chi.L.Rev. 665 (1970), suggesting that the assumed 'deterrent value' of the exclusionary rule has never been adequately demonstrated or disproved, and pointing out that because of *Mapp* all comparative statistics are 10 years old and no new ones can be obtained. Second, in order to leave some room for the states to cope with their own diverse problems, there has been generated a tendency to relax federal requirements under the Fourth Amendment, which now governs state procedures as well. For an illustration of that tendency in another constitutional field, again resulting from the infelicitous 'incorporation' doctrine, see *Williams v. Florida*, 399 U.S. 78 (1970). Until we face up to the basic constitutional mistakes of *Mapp* and *Ker*, no solid progress in setting things straight in search and seizure law will, in my opinion, occur." 403 U.S. at 490-491.

II

Alternatively, Except In Extraordinary Circumstances, The Exclusionary Rule Of *Mapp* Should Not Be Available In Post-Conviction Proceedings When The Issue Was Not Raised Prior To Or During Trial.

Article 703 of the Louisiana Code of Criminal Procedure provides that a person aggrieved by an unconstitutional search and seizure may move to suppress the unconstitutionally seized evidence "no later than three judicial days before the trial on the merits begins, unless opportunity therefore did not exist or the defendant was not aware of the grounds for the motion," but that the court in its discretion may permit the filing of such a Motion To Suppress at any time before or during the trial. Compare Rule 41(e) of the Federal Rules of Criminal Procedure, which is to the same effect.

Article 841 of the Louisiana Code of Criminal Procedure states that an irregularity or error in the proceedings cannot be availed of after verdict unless it is objected to at the time of its occurrence, and that failure to object is considered as a waiver and acquiescence.

As was pointed out above, at no time in the trial court did Barrabino through his retained attorney move to suppress as evidence at his trial the pistols and money to which he refers in his Petition For Writ of Habeas Corpus. Nor did he appeal his conviction to the Supreme Court of Louisiana as he could have

done under Article 7, Section 10, of the Louisiana Constitution.

Now, over four years later, the Louisiana Supreme Court has reluctantly ordered that the trial judge hold an evidentiary hearing "on the allegations of conviction on the basis of evidence obtained by unlawful search and seizure, and upon whether the relator counsel had made a deliberate bypass of state procedure to urge such contention," citing decisions of this Court as authority for its ruling.

The State of Louisiana respectfully submits that having been represented by retained counsel, and having failed to raise this Fourth Amendment question either prior to or during trial, Barrabino must be held to have forever waived his right to urge this issue in post-conviction Petition For Writ of Habeas Corpus, regardless, of his attorney's state of mind, barring a showing of exceptional circumstances. In other words, it is submitted that failure to timely object to the introduction of the seized evidence on Fourth Amendment grounds prior to or during the trial should generally establish a conclusive presumption that defense counsel deliberately bypassed orderly state procedures and hence waived any future objection via Petition For Writ of Habeas Corpus.

The exclusionary rule has been in force in Louisiana since 1961, when this Court handed down its landmark decision in *Mapp v. Ohio*, 367 U.S. 643. In order to set up a procedural rule for the determination of Fourth Amendment questions in an orderly, econom-

ical manner, the Louisiana Supreme Court in 1965 incorporated into Louisiana criminal procedure the Motion To Suppress Evidence provided for in Rule 41(e) of the Federal Rules of Criminal Procedure. See *State v. Davidson,* 248 La. 161, 177 So.2d 273; *State v. Rasheed,* 248 La. 309, 178 So.2d 261. When the Louisiana Legislature enacted a new Code of Criminal Procedure in 1967, Article 703 of the new code specifically provided for the filing of a Motion To Suppress Evidence prior to or during trial.

Thus, every lawyer in Louisiana was well aware of this procedural vehicle in 1969, when the instant armed robbery case was tried, and Motions To Suppress Evidence were routinely filed in criminal cases when any ground therefor existed.

Prior to the instant proceeding the Louisiana Supreme Court has consistently held that failure to timely file a Motion To Suppress Evidence results in a waiver of any objection that the evidence was seized in violation of the Fourth Amendment. See, *e.g., State v. Cryer,* 262 La. 575 (1972); *State v. Lawrence,* 260 La. 169 (1971).

There can be no doubt that Articles 703 and 841 of the Louisiana Code of Criminal Procedure are orderly state procedural statutes serving a useful and proper purpose. According to these statutes a Motion To Suppress Evidence must be filed no later than three judicial days before the trial on the merits begins, unless opportunity therefor did not exist or the accused was

not aware of the grounds for the motion, but under no circumstances can it be filed after verdict.

In the instant Petition For Writ of Habeas Corpus, Barrabino makes no attempt to show that there was no opportunity to file a timely Motion To Suppress Evidence, and indeed the contrary would appear to be true in view of the fact that Barrabino was represented by retained counsel from the time of his arraignment. Nor does the instant Petition For Writ of Habeas Corpus allude to any facts which would give rise to the assumption that prior to 1973 Barrabino was not aware of the grounds for such a motion.

The State of Louisiana respectfully submits that the majority of the Louisiana Supreme Court has misconstrued this Court's opinions in *Henry v. State of Mississippi,* 379 U.S. 443 (1965), *Fay v. Noia,* 372 U.S. 391 (1963), and *Townsend v. Sain,* 372 U.S. 293 (1963), and has failed to realize that the facts of the instant proceeding clearly distinguish it from those cases, and also from *Kaufman v. United States,* 394 U.S. 217 (1969).

In *Townsend v. Sain,* supra, defense counsel objected to Townsend's confession at the trial, contending that it had been coerced; and evidence was adduced at this time showing all of the circumstances surrounding the confession. Among other things it was brought out that Townsend was at the time a confirmed heroin addict and that he had been given an injection of narcotics shortly before he confessed. In a post-conviction habeas corpus proceeding Townsend, relying on the

evidence adduced at his trial, contended that at the time he confessed he was under the influence of drugs, including a "truth serum."

In *Fay v. Noia,* supra, Noia had argued at his trial that his confession had been coerced, and at the time of the post-conviction habeas corpus proceeding, it was conceded by the prosecution that Noia's confession had indeed been coerced, the only issue being whether his failure to appeal his conviction for murder barred further consideration of the matter in a habeas corpus proceeding.

In *Henry v. State of Mississippi*, supra, although at the trial defense counsel failed to object to the police officer's testimony on Fourth Amendment grounds, counsel did move for a directed verdict at the close of the State's case, assigning as one ground thereof the use of illegally obtained evidence. This Court conceded that the Mississippi procedural rule requiring contemporaneous objection to the introduction of illegal evidence clearly serves a legitimate state interest in that it's purpose is to avoid delay and waste of time in the disposition of a case, and that if a state's insistence on compliance with its procedural rule serves a legitimate state interest, a litigant's procedural defaults in state proceedings will prevent vindication of his federal rights. See 379 U.S. at 447-448. For the subsequent history of this case, see *Henry v. State of Mississippi,* 198 So.2d 213 (Miss. 1967), cert. denied 392 U.S. 931 (1968).

In *Kaufman v. United States*, 394 U.S. 217 (1969), defense counsel objected at trial to the admission of certain evidence on grounds of unlawful search and seizure, but new counsel did not urge this objection when the conviction was appealed. Thus in *Kaufman*, as in *Fay v. Noia*, the question was whether the failure to appeal on the Fourth Amendment issue barred further consideration thereof in a habeas corpus proceeding.

In the instant proceeding, contrary to the cases discussed above, trial counsel made no objection of any kind to the admissibility into evidence of the pistols and money — either by the filing of a Motion To Suppress Evidence prior to or during trial, or by an objection to testimony concerning these objects, or by an objection to the putting into evidence of the pistols and money, or in any other fashion. Thus the trial judge never had a chance to exclude the pistols and money from consideration by the jury and to conduct the trial without the use of this evidence (if in fact it was obtained in violation of the Fourth Amendment). Compare *Henry v. State of Mississippi*, at 379 U.S. 448.

Louisiana certainly has an interest in requiring a litigant in its courts to object to evidence, which he contends is incompetent and inadmissible, before trial, or at least at the time it is offered at the trial, in order that the judge may have the opportunity to resolve the matter as promptly as possible and thus spare the state the lost time, judgepower, and expense of a useless trial. Such a view has been adopted by the Su-

preme Court of Missouri, which consistently holds that a claim of illegal search and seizure may not be raised for the first time in a collateral attack upon a judgment of conviction. See, *e.g., Schleicher v. State,* 483 S.W.2d 393 (1972), a case on all fours with the present one.

The State of Louisiana respectfully submits that it violates all principles of the orderly administration of criminal justice to permit a person accused of a crime, and represented by able counsel of his own choosing, to fail to object on Fourth Amendment grounds to evidence used against him at his trial, and yet be able to attempt to overturn his conviction on this ground years later when it may be impossible for the State to put on sufficient credible evidence to show either the constitutional validity of the search and seizure, or the guilt of the accused.

The ever increasing number of post-conviction hearings is making it very difficult for trial judges to handle their current dockets promptly. Surely it is time for this Court to put a stop to this trend, and to begin to emphasize once again the importance of the concept of finality in criminal proceedings.

CONCLUSION

The State of Louisiana respectfully prays that a Writ of Certiorari issue herein directed to the Supreme Court of Louisiana; and that after consideration, the judgment of the Louisiana Supreme Court ordering an evidentiary hearing on the allegations of conviction on the basis of evidence obtained by unlawful search

and seizure, and upon whether trial counsel herein deliberately bypassed Louisiana procedural law, be reversed and set aside, and that the Petition For Writ of Habeas Corpus which has been filed herein by Edgar L. Barrabino be dismissed.

WILLIAM J. GUSTE, JR.,
ATTORNEY GENERAL

BARBARA RUTLEDGE,
ASSISTANT ATTORNEY
GENERAL

JIM GARRISON,
DISTRICT ATTORNEY

LOUISE KORNS,
ASSISTANT DISTRICT
ATTORNEY

Criminal Courts Building
2700 Tulane Avenue
New Orleans, Louisiana 70119
Telephone: (504) 822-2414

CERTIFICATE

I certify that a copy of this Petition For Certiorari has been mailed to:

Mr. Edgar L. Barrabino
PMB #68883 Walnut -2-
Louisiana State Penitentiary
Angola, Louisiana 70712

LOUISE KORNS
Assistant District Attorney
for the Parish of Orleans

APPENDIX

State of Louisiana

versus

Edgar L. Barabino, Jr.
No. 209-023, Section "E"
Criminal District Court
Parish of Orleans

REASONS FOR JUDGMENT ON
WRIT OF HABEAS CORPUS

Petitioner, Edgar L. Barabino, Jr., filed a Writ of Habeas Corpus on June 26, 1973, wherein he alleges that he was denied due process of law due to the ineffectiveness of counsel and alleges that certain evidence introduced at the trial was obtained illegally.

The main thrust of petitioner's writ deals with the seizure of fruits of an armed robbery and pistols which were introduced into evidence at trial. The incompetency of counsel is alleged to have been counsel's failure to object to the introduction of said evidence.

The record discloses that on April 28, 1969, a bill of information was filed against petitioner charging him with the armed robbery of one Frank Steward. On May 26, 1969, after arraignment, the defendant was tried and was represented by Mr. Lyall Shiell, petitioner's retained Counsel. The trial of May 26, 1969, was declared a mistrial because the jury was hopelessly deadlocked in their decision.

On June 17, 1969, this matter was re-tried and petitioner was found guilty. On June 27, 1969, petitioner was sentenced to serve eighteen years at hard labor in the Louisiana State Penitentiary.

Petitioner's claim for relief is based on evidence which was presented at trial and which became a matter of fact for a determination by the jury. His claim of inadequate representation stems from the fact that he was convicted and bears no credence from the record whatsoever. A defendant should not be allowed to collaterally attack a finding of guilt upon facts which were passed upon by a legally composed jury.

It is, therefore, this Court's opinion that petitioner has no grounds upon which to base relief and for the above reasons petitioner's Writ of Habeas Corpus is denied.

WRIT DENIED.

New Orleans, Louisiana, this 13th day of July, 1973.

/s/ RUDOLPH F. BECKER, III
Judge, Section "E"

SUPREME COURT OF LOUISIANA
NEW ORLEANS, 70112

STATE OF LOUISIANA, EX REL
EDGAR L. BARRABINO

versus No. 53,890

C. MURRAY HENDERSON, WARDEN
LOUISIANA STATE PENITENTIARY

October 19, 1973

In re: Edgar L. Barrabino applying for writ of habeas corpus

Granted:

PER CURIAM

An evidentiary hearing is ordered on the allegations of conviction on the basis of evidence obtained by unlawful search and seizure, and upon whether the relator counsel had made a deliberate bypass of state procedure to urge such contentions, thus waiving any present right to complain. La. C. Cr. P. art. 362 (9), Official Revision Comment (i); see, Henry v. Mississippi, 379 U. S. 443 (1965), Faye v. Noia, 372 U. S. 391 (1963) and Townsend v. Sain, 372 U. S. 293 (1963). See also Lay, Post Conviction Remedies, etc., 3 Creighton L. Rev. 5 (1969) and Grano, The Right to Counsel: Collateral Issues Affecting Due Process, 54 Minn. L. Rev. 1175, 1208 (1970).

/s/ ATJr.
/s/ MEB
/s/ JAD
/s/ PFC

SANDERS, C. J., dissents with written reasons.
SUMMERS, J., dissents for the reasons assigned by Sanders, C. J.
MARCUS, J., dissents.

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans, October 19, 1973
/s/ Harold A. Moise, Jr.
Clerk

SANDERS, Chief Justice (dissenting from the granting of the writ).

In this case, the applicant took no action at his trial by motion to suppress under Article 703 of the Louisiana Code of Criminal Procedure or by objection to bar the admission of the evidence at his trial. Hence, any objection that the evidence was tainted by an improper search and seizure was waived. C.Cr.P.Art. 703, Comment D; State v. Cryer, 262 La. 575, 262 So.2d 895; State v. Royal, 255 La. 617; 232 So.2d 292; State v. Wallace, 254 La. 477, 224 So.2d 461; State v. Davidson, 248 La. 161, 177 So.2d 273 (1965).

Article 703 is based upon Rule 41(e) of the Federal Rules of Criminal Procedure. The federal jurisprudence under this rule is consistent with that of Louisiana, holding that a waiver results. United States v. Wernecke (1943 CA7th Ill) 138 F2d 561, cert den 321

US 771, 88 L ed 1066, 64 S.Ct. 529 reh. den. 321 U.S. 803, 88 L.ed 1089, 64 S.Ct. 635; Rose v. United States (1945, CA9th Cal) 149 F2d 755; Garhart v. United States (1946, CA10th Okla) 157 F2d 777; United States v. Sferas (1954, CA7th Ill) 210 F2d 69, cert den 347 US 935, 98 L.ed 1086, 74 S.Ct. 630; Williams v. United States (1954, CA9th Cal) 215 F2d 695.

The question raised by this application is whether, absent any allegation or showing of exceptional circumstances, the applicant can set aside his conviction in this post-conviction proceeding based upon illegally obtained evidence. I think not.

It would be anomalous to hold that the defendant has waived his rights for appellate review of the legality of the evidence, as both the state and federal courts have consistently done, and yet allow the defendant to be freed on the identical contention in a post-conviction proceeding several years later.

Absent an allegation of special circumstances, the courts deny such relief in post-conviction proceedings. See Kaufman v. United States, 394 U.S. 217, 89 S.Ct. 1068, 22 L.Ed.2d 227 (1969) at footnote 8; United States v. Re, C.A.N.Y., 372 F2d 641 (1967), cert. den. 388 U.S. 912, 87 S.Ct.2112, 18 L.Ed2d 1352

In Kaufman v. United States, supra, the United States Supreme Court held that a post-conviction proceeding based on an allegation of the admission of evi-

dence from an unlawful search and seizure would lie when:

> "Appointed counsel had objected at trial to the admission of certain evidence on grounds of unlawful search and seizure, but newly appointed appellate counsel did not assign the admission as error either in his brief or on oral argument of the appeal. After oral argument of the appeal, however, petitioner wrote a letter to appellate counsel asking him to submit to the Court of Appeals a claim of illegal search and seizure of items from his automobile. Counsel forwarded petitioner's letter to the Clerk of the Court of Appeals who notified counsel that petitioner's letter had been given to the panel which had heard and was considering the appeal." (Footnote 3 at 89 S.Ct.1071)

Significantly, however, the Court added:

> "Furthermore, the § 2255 court may in a proper case deny relief to a federal prisoner who has deliberately bypassed the orderly federal procedures provided at or before trial and by way of appeal — e.g., motion to suppress under Fed.Rule Crim. Proc. 41(e) or appeal under Fed.Rule App.Proc. 4(b). Fay v. Noia, *supra*, n. 3, at 438, 83 S.Ct. 822, at 848; Henry v. Mississippi, *supra*, n. 3, at 451-452, 85 S.Ct. 564 at 569-570." (Footnote 8 at 89 S.Ct.1075)

In the present case, the state procedures have been bypassed. Applicant's petition contains no allegation to justify his action in bypassing the orderly state procedures. Hence, under the authorites cited, I would deny the writ.

CONCURRING OPINION

TATE, Justice.

An evidentiary hearing is required by our Code of Criminal Procedure and by the United States Supreme Court decisions cited in the per curiam.

In 1966, when our legislature adopted the Code of Criminal Procedure, the post-conviction remedies were expressly broadened. Article 363(9) affords the remedy whenever a person proves he is convicted without due process of law, and Article 354 requires a hearing whenever the petition alleges facts which would entitle the relator to relief.

An express purpose of the broadened remedy is to permit the state courts to hold hearings and find facts as to claims of deprivation of federal constitutional rights. Official Revision Comment (i), Article 362. This is to avoid the unseemly spectacle of state judges and state prosecutors being summoned over to federal court to explain their actions. It is also to permit state courts to afford state prisoners the rights guaranteed by the federal constitution, for vindication of which state prisoners would otherwise have to resort to federal courts.

The petitioner states a claim based upon a search and seizure in violation of the federal constitution. He did not object at the trial to introduction of the objects seized, but, since Fay v. Noia, 272 U.S. 391 (1963), this is no bar to post-conviction relief. In Henry v. Mississippi, 379 U.S. 443 (1965), the United States Supreme Court expressly held that a state prisoner is not barred by lack of trial objection from raising the issue of an unconstitutional search and seizure. It there held that the criminal defendant was at least entitled to a determination of whether the right to object was knowingly and intelligently waived by a deliberate bypass of state procedural requirements for timely raising the objection.

These decisions have never been overruled. In fact, in Kaufman v. United States, 394 U.S. 417 (1969), in affording the same right to habeas relief to federal prisoners in the absence of objection to the alleged illegal seizure at the trial on the merits, the United States Supreme Court noted: "Our decisions leave *no doubt* that the federal habeas remedy extends to state prisoners alleging that unconstitutionally obtained evidence was admitted against them at trial. * * * [Citing four recent United States Supreme Court decisions.] 394 U.S. 225. (Italics ours.)

Scholarly commentary is virtually unanimous that this is the force and effect of the United States Supreme Court decisions in the field. Under these decisions, cases cited that absence of objection waives right to *appellate* consideration are completely inapplicable to

their waiver in *habeas* proceedings. See, e.g., Comment, 26 La.L.Rev. 705 (1966).

We may disagree with the objectives, the reasoning, and the result of these decisions. But, if we respect the judicial oath we took to enforce the federal and state constitutions — indeed, if we respect the concept of the rule of law, — we must obey the interpretations of these rulings by the highest court of the land.

The United States Constitution as interpreted by that court is binding upon every court in this land, including the Supreme Court of Louisiana and the federal courts sitting in Louisiana. If *we* do not perform our constitutional duty to enforce the United States Supreme Court's interpretations of the federal constitution, the federal district courts will have to do so, as alas all too often has been the case in the last several years.

I have no serious quarrel with those who question the wisdom of the rulings we must enforce — who state that there must be some better way to vindicate federal rights than to have round after round of post-conviction hearings, never really terminating a criminal prosecution as long as pen and ink and inventive minds remain in the penitentiaries.

Indeed, I think we must seriously and soon explore on the state level a pre-trial omnibus hearing device, used successfully in other jurisdictions, where the trial court is under an affirmative duty to investigate and require affirmative assertion or waiver of claims to constitutional deprivation in connection with arrest,

search and seizure, and confessions: This might determine the issues once and for all and — if determined unfavorably to the accused — permit subsequent proceedings be devoted entirely to ascertaining guilt or innocence. If he is found guilty, suitable correctional or rehabilitation attention may be directed to the prisoner, without the indefinite distraction of prolonged attempts to secure post-conviction relief.

Until this is done, or until the United States Supreme Court modifies the rulings now binding upon this court, we cannot do otherwise than we do here, i.e., order an evidentiary hearing on whether the failure at the merit-trial to raise the issue was a knowing and intelligent waiver of the right to raise the federal-constitutional issue. True respect for law and order requires respect not only for law and rulings with which we agree, but also for those with which we disagree.

SUPREME COURT, U.S. DEC 17 19
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

No. 73-836

STATE OF LOUISIANA, ex rel.
EDGAR L. BARRABINO,
Respondent,

versus

C. MURRAY HENDERSON, Warden,
Louisiana State Penitentiary,
Petitioner.

SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

WILLIAM J. GUSTE, JR.,
ATTORNEY GENERAL
OF LOUISIANA

BARBARA RUTLEDGE,
ASSISTANT ATTORNEY
GENERAL OF LOUISIANA

JIM GARRISON,
DISTRICT ATTORNEY
FOR ORLEANS PARISH

LOUISE KORNS,
ASSISTANT DISTRICT
ATTORNEY FOR
ORLEANS PARISH

IN THE
SUPREME COURT OF THE UNITED STATES

No. 73-836

STATE OF LOUISIANA, ex rel.
EDGAR L. BARRABINO,
Respondent,

versus

C. MURRAY HENDERSON, Warden,
Louisiana State Penitentiary,
Petitioner.

SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

MAY IT PLEASE THE COURT:

The State of Louisiana is of the respectful belief that this Honorable Court's decision in *Davis v. United States*, 411 U.S. 233 (1973), is highly relevant herein, although through oversight this case is not discussed or cited in Louisiana's original Petition For Certiorari in the instant proceeding.

In *Davis*, three years after his trial the accused brought a collateral attack on his conviction, alleging that there had been unconstitutional discrimination

in the composition of the grand jury that indicted him. The district court found that although Davis could have done so, he at no stage of the proceedings attacked the grand jury's composition, and it concluded that under Federal Rule of Criminal Procedure 12(b)(2) he had waived his right to do so. The Court of Appeals affirmed on the basis of *Shotwell Mfg. Co. v. United States,* 371 U.S. 341 (1963), and Rule 12(b)(2).

This Court granted certiorari and affirmed, holding that the waiver standard set forth in Rule 12(b)(2) governs an untimely claim of grand jury discrimination not only during the criminal proceeding but also later on collateral review.

> "We think it inconceivable," said this Court, "that Congress, having in the criminal proceeding foreclosed the raising of a claim such as this after the commencement of trial in the absence of a showing of 'cause' for relief from waiver, nonetheless intended to perversely negate the Rule's purpose by permitting an entirely different but much more liberal requirement of waiver in federal habeas proceedings." 411 U.S. at 242.

Similarly, the State of Louisiana is of the respectful view that Article 703 of the Louisiana Code of Criminal Procedure, which provides that a person aggrieved by an unconstitutional search and seizure may move to suppress the unconstitutionally seized evidence "no later than three judicial days before the trial on the merits begins" unless some exceptional circumstances

are shown, may not be circumvented years after the trial in a habeas corpus proceeding.

Respectfully submitted,

WILLIAM J. GUSTE, JR.,
ATTORNEY GENERAL

BARBARA RUTLEDGE,
ASSISTANT ATTORNEY
GENERAL

JIM GARRISON,
DISTRICT ATTORNEY

LOUISE KORNS,
ASSISTANT DISTRICT
ATTORNEY

Criminal Courts Building
2700 Tulane Avenue
New Orleans, Louisiana 70119
Telephone: (504) 822-2414

CERTIFICATE

I certify that a copy of this Supplemental Petition For Certiorari has been mailed to:

Mr. Edgar L. Barrabino
PMB #68883 Walnut -2-
Louisiana State Penitentiary
Angola, Louisiana 70712

LOUISE KORNS
Assistant District Attorney
for the Parish of Orleans